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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. [redacted] : 2 : -

SURPLUS TRADING COMPANY ..... *Plaintiff in Error*

v.

J. M. HAYNIE, AS SHERIFF AND EX-OFFICIO COLLECTOR OF TAXES FOR PULASKI COUNTY, ARKANSAS ..... *Defendant in Error*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR, AND BRIEF IN SUPPORT

H. W. APPLEGATE,
Attorney General of Arkansas
SAM T. POE,
TOM POE,
For Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 666.

SURPLUS TRADING COMPANY.....*Plaintiff in Error*

v.

J. M. HAYNIE, AS SHERIFF AND EX-OFFICIO COLLECTOR OF TAXES FOR PULASKI COUNTY, ARKANSAS.....*Defendant in Error*

MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

Comes now the defendant in error in the above entitled cause, by his counsel of record, and moves that the writ of error herein be dismissed.

H. W. APPLEGATE,
Attorney General of Arkansas;

SAM T. POE,

TOM POE,
For Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS.

Defendant in error insists the motion to dismiss the writ of error should be sustained because the action of the Supreme Court of Arkansas, to which the writ of error is directed, is not a final decree.

The decree of the Supreme Court of Arkansas in this action is not a final decree. Defendant in error earnestly insists the Supreme Court of the United States is, therefore, without jurisdiction to review it.

This action was originally filed in the Chancery Court of Pulaski County, Arkansas, on July 19, 1923. (R. 6.) The Chancery Court of Pulaski County, Arkansas, decided it adversely to the predecessor in office of the defendant in error on June 7, 1926. From the decree of the trial court the predecessor in office of the defendant in error prayed an appeal to the Supreme Court of Arkansas, which was granted. (R. 24, 25, 26.) The Supreme Court of Arkansas on June 27, 1927, reversed the decree of the Chancery Court of Pulaski County, Arkansas, and remanded the cause to the trial court with directions to allow the defendant in error to recover against plaintiff in error the amount of tax based upon the assessment for the year 1922, with statutory penalties. (R. 87.)

Petitions for rehearing were filed in the Supreme Court of Arkansas on behalf of the plaintiff in error and the defendant in error. (R. 95.)

On September 26, 1927, the petitions for rehearing were denied by the Supreme Court of Arkansas. (R. 96.)

Plaintiff in error made application for a writ of error to the Supreme Court of the United States on October 11, 1927, and the application was, on that date, granted by the Chief Justice of the Supreme Court of Arkansas. (R. 98, 99.)

Subsequently plaintiff in error lodged the record in the Supreme Court of the United States on December 27, 1927, without awaiting the entry of a decree by the Chancery Court of Pulaski County, Arkansas, as provided for in the decree of the Supreme Court of Arkansas.

The decree of the Supreme Court of Arkansas, reads as follows:

> "This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in so much of the proceedings and decree of said Chancery Court as dismisses the complaint of the appellant insofar as the same applied to the taxes of the year 1923; but that as to the taxes of the year of 1922, the holding of the Chancery Court is erroneous and should be reversed.
>
> "It is therefore ordered and decreed by the Court that the decree of said Chancery Court in this cause rendered be, and the same is hereby, insofar as the complaint applied to the taxes for the year 1923, affirmed with costs.
>
> "It is further ordered and decreed that the decree of said Chancery Court in this cause rendered, insofar as the complaint applied to the taxes of the year 1922, be, and the same is hereby, for the error aforesaid, reversed, annulled (fol. 147) and set aside with costs, and that this cause be remanded to said Chancery Court with directions to enter a decree allowing the sheriff and collector of Pulaski County to recover of said appellee, Surplus Trading Company, the amount of taxes and penalty for the year 1922.
>
> "It is further ordered and decreed that said appellants recover of said appellees all their costs in this Court in this cause expended and have execution thereof." (R. 87.)

The decree of the Supreme Court of Arkansas to which the writ of error granted to plaintiff in error runs provides for the reversal of the part of the decree of the Chancery Court of Pulaski County, Arkansas, insofar as the same applies to the taxes for the year 1922. It also specifically an-

nulled and set aside such part of the decree of the trial court as applied to taxes for 1922 and remanded the cause to the Pulaski Chancery Court with directions to enter a decree allowing defendant in error to recover of plaintiff in error the taxes for the year 1922, with statutory penalties.

It is conceded no decree has been entered by the Chancery Court of Pulaski County, Arkansas, since the reversal of this action by the decree of the Supreme Court of Arkansas. The decree of the Supreme Court of the State of Arkansas set aside and annulled the decree of the Chancery Court of Pulaski County, Arkansas. Hence, there is no decree—final or otherwise—to which the writ of error granted plaintiff in error may run.

The Supreme Court of Arkansas has repeatedly held when a case triable *de novo* is remanded to the court below for the entry of a decree, the parties may be permitted to introduce material evidence discovered since the original trial, and may amend the pleadings for the purpose of setting up matters materially affecting the merits, subsequently arising.

Collins v. Paepcke-Leicht Lumber Co., 82 Ark., 1, 100 S. W., 86.

Chicago Mill & Lumber Co. v. Osceola Land Co., 94 Ark., 183, 126 S. W., 380.

It is an elemental proposition that the Supreme Court of the United States is without jurisdiction to review the action of the State court of last resort when the action of that court is not in the nature of a final decree or judgment.

A case with strikingly similar facts where the Supreme Court of the United States held it was without jurisdiction on a writ of error to review the decree of the highest state because the decree was not final is that of *Schlosser v. Hemphill*, 198 U. S., 173. Defendant in error insists the facts of the present case bring it within the rule declared in *Schlosser v. Hemphill, supra.*

CONCLUSION

It is, therefore, respectfully urged that the motion to dismiss should be sustained and the writ of error herein should be dismissed.

H. W. APPLEGATE,
Attorney General of Arkansas

SAM T. POE,

TOM POE,
For Defendant in Error.